In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-3

ALBERT GOLDSTEIN ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment filed on January 7, 1972, in the United States District Court for the Eastern District of New York charged petitioners with various violations of the internal revenue laws (26 U.S.C. 7201; 7206) and with conspiracy to commit those offenses. Following a five-week trial, the jury commenced deliberations on the morning of October 5, 1972. On October 6, 1972, at 3:10 p.m., the jury sent the trial judge a note indicating they were unable to reach a verdict (A. 47).[1] Following receipt of the note, and after a colloquy with counsel, the court gave a modified "Allen" charge to the jury (A. 49-52). Immediately thereafter, defense counsel moved for a mistrial, claiming that the note reflected a "hopeless * * * deadlock" (A. 53). The motion was denied.

[1] "A." designates references to the government's appendix in the court below, a copy of which is being lodged with the Clerk of this Court.

At approximately 5:00 p.m. a second note, signed by the foreman, was received from the jury, which stated (A. 56):

> I'm sorry to say that after reviewing most of the testimony and using what arguments and persuasion we could bring to bear, Mrs. Rappaport has insisted that under no circumstances can she vote guilty on any of the Counts.

The jury was brought in and after announcing a verdict of not guilty as to one count, the foreman indicated that the jury was in disagreement on the remaining 18 counts (A. 56-58). The court asked the jury "And it's clear that you are in disagreement on the rest of the counts?" The foreman of the jury responded: "I am afraid so" (A. 58). Thereafter, the court discharged the jury.

Prior to retrial scheduled before another district judge, petitioners moved to dismiss the indictment. Despite the defense motion for a mistrial when the first jury note was received, petitioners contend that the district court's declaration of a mistrial two hours later was *sua sponte* and was not the result of a scrupulous exercise of the jury function. The motion was granted. The court of appeals reversed and remanded (Pet. App. 1a-17a).

Petitioners' claim—that 18 U.S.C. 3731 barred an appeal by the government in the circumstances of this case and further that retrial is barred by the Double Jeopardy Clause—were thoroughly considered and properly rejected by the court below, upon whose opinion we rely (Pet. App. 1a-17a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,

Solicitor General.

AUGUST 1973.

DOJ-1973-08